Supreme Court, U.S.
FILED
SEP 13 1993
OFFICE

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

Ken Meek, et al., Petitioner

-vs-

Gem Boat Service, Inc., Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF OTTAWA COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is an attorney's communication of information and advice to his clients-class members and request for information from them unprotected under the First and Fourteenth Amendments to the Constitution of the United States?

2. May a trial court constitutionally restrict class members' access to matters of public record, information and advice from the class' attorney because the trial court's opinion of the nature and scope of remedies available to the class are materially less then such class attorney's opinion?

3. Does ex-post facto punishment for exercise of such protected speech avoid the constitutional restraint imposed on a prior restraint order?

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OPINIONS BELOW

The judgment and opinion sought to be reviewed was unreported and may be cited as *Ken Meek v. Gem Boat Service, Inc.*, No. 92-OT-010 (Ottawa County Court of Appeals, Ohio, February 12, 1993).

The decision of the Ohio Supreme Court denying discretionary review reported in the table at 66 Ohio St.3d 1507 (June 23, 1993).

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was announced and filed on February 12, 1993.

The decision of the Ohio Supreme Court denying discretionary review was announced and filed on June 23, 1993.

Jurisdiction of this Court to review the judgment of the court below by writ of certiorari is conferred by 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

(Effective 1791)

United States Constitution, Amendment XIV:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 11, 1987, Plaintiffs-Appellants filed a class action Complaint for damages caused by Defendant-Appellee's failure and refusal to submit to the Public Utilities Commission of Ohio's jurisdiction which had already been adjudicated by the P.U.C.O. Plaintiff's attorney in the subject class action damages Complaint had represented the class members for over ten years before the P.U.C.O. and in other disputes and litigation.

Commencing on August 21, 1989 a jury trial was conducted at which each class member was required to submit evidence of each such class member's damages. A verdict of $120,126.25 was returned as a total of all such individual proofs. Such judgment was reversed by a divided Court of Appeals as having applied an incorrect measure of damages and remanded for a new class notice and trial on damages.

The trial court adopted, approved, signed and journalized an "Amended Notice to Potential Class Members" on May 21, 1991. Plaintiffs, through their counsel, mailed copies of such journalized Notice along with a letter and questionnaire from Plaintiff's counsel. In such letter Plaintiffs-Appellants' counsel informed his class member clients of what had happened since the jury trial judgment and advised them as to his opinion of their options and the probable consequences of each option. The questionnaire sought information from each class member necessary to pursue the damages which, in his opinion, the class members were entitled to recover.

Defendant-Appellee moved for sanctions against Plaintiffs-Appellants and their counsel for such communication with the class members. The trial court, on January 24, 1992, granted such motion holding that:

> "The misleading contents of the cover letter of June 20, 1992 (sic) and of the questionnaire far

> exceed in attitude, bias and content the notice selected by the Court and the contents of notice prescribed by Civil Rule 23(C)(2)."

The trial court then held that:

> "As a sanction the Court, under its general equity powers, its inherent power to control the conduct of counsel, and as specifically authorized in Civil Rule 23, ORDERS that plaintiffs' attorney David R. Pheils, Jr. be removed from further representation herein, that he have no further participation in this case, that he pay the costs of these proceedings to date from remand from the Court of Appeals, including all costs related to the abortive second notice, and that he pay in addition as a sanction the sum of Five Hundred Dollars ($500.00) to defendants' attorneys as compensation for their time and expense incurred on the matter of notice and sanctions. See 1 Moore's Federal Practice, Manual for Complex Litigation, Article 30.24, 1986 and Royal Indemnity Co v. J.C. Penney Co., 27 O S 3rd 31, 1986, and cases cited therein."

The Court of Appeals affirmed the trial court's judgment observing that:

> "The court noted that the cover letter and questionnaire which were mailed by attorney Pheils with notice to the potential class members contained 'misleading contents.' The court noted that it now faced the difficult problem of setting right the frame of mind of the potential class

> members and of dispelling the self-serving misrepresentations contained in the cover letter and cover questionnaire. The court could reasonably conclude from these events, that attorney Pheils was no longer competent to protect the interest of the class or to continue representation of the class."

The Ohio Supreme Court denied discretionary review on June 23, 1993.

ARGUMENT FOR ALLOWANCE OF THE WRIT

FIRST QUESTION:

1. Is an attorney's communication of information and advice to his clients-class members and request for information from them unprotected under the First and Fourteenth Amendments to the Constitution of the United States?

The Fifth and Ninth Circuits have unequivocally answered the first question in the negative. ***Bernard v. Gulf Oil Co.***, 619 F.2d 459 (5th Cir., 1980); ***Domingo v. N.E. Fish Co.***, 727 F.2d 1429 (9th Cir., 1984). ***Bernard*** held at pages 477 and 478:

> "We therefore hold that the district court's order restricting communication by parties and their counsel with actual and potential class members is an unconstitutional prior restraint."

and to such constitutional protections effect upon the Federal Rules:

> "Because we hold that the order violates the First Amendment, it follows that it cannot be an 'appropriate order' under Rule 23(d) of the Federal Rules of Civil Procedure."

This Court in ***Gulf Oil Co. v. Bernard***, 452 U.S. 89 (1982), while affirming the Fifth Circuit's ***Bernard*** ruling, declined to reach the constitutional issues limiting the basis to the trial court's discretion under *Rule 23, Federal Rules of Civil Procedure*. However, since this case deals with the comparable

Ohio Rule of Civil Procedure which the Ohio Courts have construed to allow such trial court restriction, the only issue before this Court is the constitutional one. At page 705, this Court said:

> "Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression."

This Court now has an opportunity to give guidance to the Courts and class representatives and their counsel by setting some standards.

SECOND QUESTION:

> 2. May a trial court constitutionally restrict class members' access to matters of public record, information and advice from the class' attorney because the trial court's opinion of the nature and scope of remedies available to the class are materially less then such class attorney's opinion?

The second question has also been answered in the negative by the Fifth Circuit in ***Bernard*** and the Ninth Circuit in ***Domingo***. The ***Domingo*** Court observed at page 1441:

> "The trial court seems unnecessarily concerned that counsel would be overzealous in the pursuit of claims. The advocacy system is designed to correct for excesses through response from opposing counsel, rather than through court-imposed restrictions which interfere with legal assistance to class members." (Emphasis added)

and held that:

> "The district court must allow all class members a reasonable time in which to submit claims prepared with the aid of counsel ab initio rather than supplementary to their original claims." (Emphasis added)

and *Bernard* at page 477:

> "The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice." (Emphasis added)

Because a judge is supposed to be an independent, unbiased referee of litigation, it is self-evident that it is improper for him to make strategic decisions on behalf of a party as to what remedies that party will pursue or what evidence that party will assemble and offer into evidence at trial.

A trial judge is supposed to make rulings on those legal arguments made and the admissibility of evidence offered by parties and their advocates. It is the provence of the attorney for a party to advise that party as to the issues to pursue, the remedies to seek and the evidence to offer in support thereof. The attorney, not the judge, is representing the client!

If a trial judge can disqualify an attorney because that attorney has a more expansive view of the issues, remedies and evidence involved in his client's case then that attorney's client is denied an effective review of the trial court's actions because

his attorney, controlled by the judge, cannot present such issues and evidence for the record.

An attorney not only has a right but a duty to advise his client as to his opinion of the issues involved, remedies available and evidence necessary to pursue his client's claims and to do so with his client's concurrence. The judge has the power and duty to rule on what the party's attorney presents and, if the judge rejects part or all the party's attorney presents, then the record is made for an appellate review and determination of whether the attorney or the judge was correct on part or all of the matters about which they disagreed.

The subject letter and questionnaire in this case clearly deals with the kind of communication, advice and counsel which any party is entitled to receive from his/her attorney regardless of whether the trial judge agrees or disagrees with such attorney's opinions. Denial of such information and advice is a denial of due process protected by the Fourteenth Amendment §1 of the United States Constitution. Such communication is precisely what the Ohio trial court punished.

THIRD QUESTION:

3. Does ex-post facto punishment for exercise of such protected speech avoid the constitutional restraint imposed on a prior restraint order?

The third question must be answered in the negative also.

The Court of Appeals below dismissed Plaintiffs-Appellants' First Amendment argument by stating at page 6:

> "Finally, this court finds that appellants asserting that the trial court's actions were an infringement of First Amendment rights is without merit. The actions of the court did not constitute any prior restraint, as the communications had already occurred."

Plaintiffs-Appellants submit that punishment for exercise of the First Amendment right to Freedom of Speech accomplishes virtually the same effect upon such right as a prior restraint order. The Ninth Circuit in ***Carlin Communications, Inc. v. Mountain States Zel & Tel. Co.***, 827 F.2d 1291 (9th Cir., 1987) held that the threat of prosecution if such right is exercised is equivalent to prior restraint where the messages have not previously been determined to be non-protected speech. There was no argument by Respondent nor any finding by either lower court that the subject communications were not protected speech.

Certainly it is self-evident that the chilling effects of restraining constitutionally protected speech can be accomplished by either prior restraint, i.e. explicitly prohibiting it by order before exercise, or by the threat of punishment after if such right is exercised. That a person in a criminal proceeding may not be punished for exercise of his/her First Amendment right to speech is too well established to need citation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the Ohio Court of Appeals below should be reversed.

Respectfully submitted,

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APPENDIX

Ken Meek, Appellant
v.
Gem Boat Service, Inc., Appellee

Court of Appeals No. 92-OT-010.
6th District Court of Appeals of Ohio, Ottawa County.
Opinion and Judgment Entry.
Decided on February 12, 1993.

Trial Court No. 241146.

David R. Pheils, Jr., for Appellants.

Mark I. Wallach, Joseph A. Castrodale and Marilyn G. Zack, for Appellee.

HANDWORK, J. This case has twice before been appealed to this court, has twice been remanded, and now returns to this court following yet another notice of appeal. Appellants, a class composed of water and sewer customers of appellee, Gem Boat Service, Inc., aka Gem Beach Marina, inc. present one assignment of error for consideration which is:

> "I. THE TRIAL COURT ERRED BY IMPOSING SANCTIONS AGAINST PLAINTIFFS AND PLAINTIFFS' COUNSEL."

To understand the atmosphere which existed when the trial court issued the judgment appellants now challenge, a brief review of the facts and procedure of this case must be given.

This case began when appellants filed a class action complaint in the Ottawa County Court of Common Pleas on September 11, 1987. The trial court certified the class in February 1988 and the first appeal was brought to this court to challenge the certification. This court issued a decision and journal entry on October 7, 1988 affirming the trial court's certification order and remanding the case for further proceedings. The case did proceed to jury trial, liability was found and damages were assessed, but appellee successfully challenged the judgment entry which awarded damages when appellee brought the second appeal in this case to this court. In a decision and journal entry dated September 14, 1990 this court ruled: (1) damages were improperly assessed; and (2) notice was not properly sent to class members pursuant to the provisions of Civ.R. 23(C)(2) because the notice was sent by appellants' attorney without any order of the court directing him to send notice. Since the trial court did not correct the error by directing proper notice be sent or by vacating the class certification order the case was remanded for further proceedings. The trial court directed both appellee and appellants to prepare and file proposed notices to the class members in a pretrial order file stamped on May 6, 1991. Amended pleadings and the proposed notices were filed. On August 5, 1991 appellee filed a motion for sanctions "because of the misconduct of class counsel David R. Pheils, Jr." The memorandum in support of the motion showed that on May 29, 1991 the court approved the proposed notice to class members admitted by appellee. Appellee then asserted that it had "recently become aware that, without *** [the trial court's] authorization, Pheils sent out the court-directed Notice to potential class members as an enclosure to his own personal cover letter and questionnaire." Appellee argued that appellants' counsel had once again violated the directives in Civ.R. 23(C)(2) that the trial court issue notice to potential

class members directly, or order a party to issue notice pursuant to specific directions from the court. A memorandum in opposition to the motion for sanctions was filed. On January 24, 1992 the Ottawa County Court of Common Pleas issued a judgment entry in which it ordered: (1) appellants' attorney David R. Pheils, Jr. be removed from further representation in the case; (2) that he also be barred from further participation in the case; (3) and that he make payment for the cost of the proceedings from the time of remand, including the cost of the improper mailing of notice, and for opposing counsel's attorney fees in the sum of $500. The trial court prefaced the sanctions order with a finding that appellants' counsel had "yet again sent out an improper notice to the prospective class members." The court explained it was imposing the sanctions "under its general equity powers, its inherent power to control the conduct of counsel, and as specifically authorized in Civil Rule 23 ***."

In a case involving the review of a trial court's decision to revoke the pro hac vice admission of out of state attorneys the Supreme Court of Ohio recognized as a general principle of law that a "trial court's power to protect its pending proceedings includes the authority to dismiss an attorney who cannot, or will not, take part in them with a reasonable degree of propriety." Royal Indemnity Co. v. J.C. Penney, Co. (1986), 27 Ohio St.3d 31, 34. The court also stated: "A trial court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it." Id., at 35. The court then noted that the standard to be applied by an appellate court reviewing a trial court's order removing counsel from a case is an abuse of discretion. Id. An abuse of discretion "'connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" Calderon v. Sharkey (1982), 70 Ohio St.2d 218, 219-220

(quoting State v. Adams (1980), 62 Ohio St.2d 151). The duty and authority of a trial court to govern the proceedings before it exists in every case. In addition, when a class action suit has been filed, courts have long recognized that an additional responsibility exists for the trial court to first ensure pursuant to Civ.R. 23(A)(4), which requires a finding that "the representative parties will fairly and adequately protect the interest of the class ***", that the named counsel for the class is capable of adequately representing the class during the proceedings. See North American Acceptance Corporation Securities Cases v. Arnall, Golden & Gregory (5th Cir. 1979), 593 F2d.642, 644 certiorari denied (1979), 444 U.S. 956.[1] After making an initial determination that the named attorneys for the class are capable of adequately representing the class, the court assumes a continuing duty to "scrutinize the class attorney to see that he is adequately protecting the interests of the class. If, at any time, the trial court realizes that class counsel should be disqualified, it is required to take appropriate action. It must either enter orders eliminating the problem or decertify the class." Id., at 645. Accordingly, this court will not reverse the actions of the trial court in this case absent a showing that an abuse of discretion occurred as the trial court carried out its responsibilities.

Appellants contend that attorney Pheils did nothing in this case which justified the trial court's imposition of sanctions. Rather, appellants contend that attorney Pheils was merely communicating with his clients and the communication was protected by the First Amendment. Appellants contend that the trial court's imposition of sanctions amounts to a restraint of free speech and constitutes error. Appellants' contentions are not persuasive.

This court has previously ruled that Civ.R. 23(C)(2) contains "mandatory language *** [which] indicates that the court must order that a notice be sent. However, we find nothing improper with the court ordering a party to send the notice." Meek v. Gem Boat Service, Inc. (Sept. 14, 1990), Ottawa App. No. 89-OT-32, unreported. That statement of law was made in a previous decision relating to this case, and counsel for appellants was aware of that decision. The record shows that after that decision was announced by this court and the case was remanded to the trial court for further proceedings, the trial court did approve the language in an amended notice to be sent to the potential class members in this case. However, nothing in the record reflects any action taken by the court to either send the notice directly, or to order appellants' counsel to send the notice. Therefore, appellants' counsel's action of sending the notice, accompanied by a cover letter from counsel and a questionnaire drafted by counsel to the prospective class members, without prior court approval, resulted in the second commission of an error which had already required the reversal of this case for remedial action. The trial court did not act in an unreasonable, arbitrary or unconscionable manner, therefore, when it ruled that attorney Pheils' actions required his removal from the case and from further participation in the case, so that the court could protect the integrity of the proceedings.

Furthermore, the court did not commit an error of law, and did not act in an arbitrary, unreasonable or unconscionable manner when it determined that pursuant to Civ.R. 23, it had an obligation to remove attorney Pheils from the case. The court noted that the cover letter and questionnaire which were mailed by attorney Pheils with notice to the potential class members contained "misleading contents." The court noted that it now faced the difficult problem of setting right the frame of

mind of the potential class members and of dispelling the self-serving misrepresentations contained in the cover letter and cover questionnaire. The court could reasonably conclude from these events, that attorney Pheils was no longer competent to protect the interest of the class or to continue representation of the class.

Finally, this court finds that appellants assertion that the trial court's actions were an infringement of First Amendment rights is without merit. The actions of the court did not constitute any prior restraint, as the communications had already occurred. In addition, the trial court did not impose the sanctions as a punishment for communicating with clients, rather it imposed the sanctions on attorney Pheils because attorney Pheils had demonstrated an unwillingness to conduct the case in a manner required by law, and an inability to adequately represent the class members.[2] Appellants' sole assignment of error is not well-taken. The trial court imposed no sanctions directly on appellants, rather the trial court imposed sanctions only on appellants' counsel. In ordering the disqualification of appellants' counsel, the court acted responsibly, protecting the rights and interests of the class. See In re Nissen Motor Corp. Antitrust Litigation (1975), 22 Fed.R.Serv.2d 63, 66. The judgment of the Ottawa County Court of Common Pleas is affirmed. Attorney David R. Pheils, Jr. is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4, amended 1/1/80.

Handwork, J., Abood, J., Resnick, J. concur.

Footnotes:

[1]The text of Civ.R. 23(A)(4) is identical to the text of Fed.R.Civ.P. 12(A)(4), so federal cases interpreting Fed.R.Civ.P. 12(a)(4) are instructive in this case.

[2]The cases cited by appellants in support of their contention that the actions of the trial court were in contravention to First Amendments rights are distinguishable from this case. In both Gulf Oil Company v. Bernard (1981), 452 U.S. 89, and Domingo v. New England Fish Company (9th Cir. 1984), 727 F2d 1429, the trial courts had imposed specific directives prohibiting the class counsel from unauthorized communication with potential class members. The trial court in this case imposed no such directive, and nothing in the record before the court indicates that appellants' counsel was prohibited from general communication with potential class members. Rather, the record reflects that the trial court imposed the sanctions because counsel improperly sent notice of the class action to potential class members without a court order, and included misleading statements in communications sent to potential class members which indicated an inability of the counsel to adequately represent the class.

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June 20, 1991

Dear Class Member:

As you know I represent you on a contingent fee basis through your class membership in Ken Meek v. Gem Beach Marina on which we had a trial on August 21 and 22, 1989. The measure of damages used was set by Judge Gilson at three times whatever you had paid for water and sewer services to Gem Beach Marina from 1961 through 1987.

The Court of Appeals, however, reversed such judgment and held that the class can "recover only the actual damages they sustained as a result of Appellants' (Gem Beach Marina) failure to submit to the P.U.C.O.'s regulation, which pursuant to statute must be trebled". Such decision both helps and hurts our damages.

It helps in that we can recover for more than just three times any payment made in excess of the value of the utility services provided. This means we can recover for: loss of use of cottages caused by low or no water conditions; humiliation and embarrassment before guests; inability to cook, wash, flush toilets, clean cottages, take showers, etc.; loss of rental income; stench from uncleaned sewage tanks; association assessments to cover costs of forcing Gem Beach to submit; mental pain and anguish from Gem Beach Marina's refusal to correct problems; etc.

It hurts in that we can't recover for the entire amount of any payments made, but must furnish evidence of the value, if any, of the services provided and then can recover three times the excess charge. This means we may recover more than the last judgment or we could recover less. It is my opinion that the jury will return a much larger verdict for us, but it is "possible" that it could be much smaller.

Pursuant to the Order of the Court, I have enclosed a copy of an amended Rule 23 notice to class members. If you wish to continue to participate you need do nothing regarding this notice. If you do not wish to continue to participate, you can return the election form printed on the last page of the notice. If you do not participate and we recover a significant judgment, it is my opinion that you will be unable to then pursue your claims separately because of possible statute of limitations problems raised by the Defendant.

As you know, I am representing the class on a contingent fee of one-third (1/3) of whatever is recovered from a settlement before trial or 40% of whatever is recovered after trial commences. That means that if what is, in my opinion, a remote possibility happens and we recover little or nothing, you will have lost only some of your time while if what is, in my opinion, the most probable result happens and we recover a significant amount, you will recover more than your actual damages.

For example, if your actual damages is determined at trial to be $5,000.00 that amount will be tripled to $15,000.00 in the judgment. After deducting 40% attorney fees and a pro rata share of the costs incurred, such as expert witness fees, you will probably receive over $8,000.00.

I have enclosed a questionnaire which I need completed by you and returned to me at your earliest convenience in the enclosed, self-addressed envelope. If you have any questions, please feel free to call me at your convenience at the number above.

Sincerely,

David R. Pheils, Jr.

DRP:ck
enclosure

QUESTIONNAIRE

Full Name _____

Present Address _____

_____

1. Please give all addresses and phone numbers where you can be reached over the next year.

2. Address and lot number for all locations at which you paid for water and/or sewer services from Defendant.

3. As to each such location the years and amounts you paid to Defendant for such services.

4. Did you experience any of the following conditions and if so how often.

1. ( ) Low pressure?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

2. ( ) No pressure?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

3. ( ) Dirty water?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

4. ( ) Unrepaired water leaks?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

5. ( ) Adequate water pressure at Marina and docks while your cottage had low or no pressure?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

6. ( ) Stench from uncleaned sewage tanks?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

7. ( ) Unable to clean cottage, shower, wash dishes, flush toilets, cook, etc.?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

8. ( ) Unable to use and/or rent cottage?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

9. ( ) Limited cottage use because of water/sewer problems?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

10. ( ) Embarrassed/humiliated before guests?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

11. ( ) Arrogant, officious and unsympathetic response to complaints by Defendant?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

12. ( ) Frustrated, depressed and upset due to inadequate water/sewer service?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

13. ( ) Physical symptoms as a result such as headaches, stress, etc.?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

14. ( ) Renter complaints or lost rentals due to inadequate service?

( ) Always ( ) Often ( ) Sometimes ( ) Seldom ( ) Never

5. As to each of these you checked in "4" above please describe such circumstances to the best of your recollections.

Number Description

6. How much assessments to your Lot Owners Association to force Defendant to submit to P.U.C.O. regulations did you pay?

$_____ When ?

7. When did you first learn that the Defendant was required to submit to P.U.C.O. regulations?

( ) When informed by Mr. Pheils in Summer of 1985.

( ) When learned of Complaint in P.U.C.O. in 1986.

( ) When P.U.C.O. issued its order in 1987.

( ) Other _____.

8. Would you have paid anything for the kind of service you received from Defendant up until 1987? ( ) Yes ( ) No.

9. Have you ever received such poor water and/or sewer service from any other utility? ( ) Yes ( ) No.

10. If yes describe the circumstances and identify the utility.

11. Any other comments.

_____

Signature

Ken Meek, Plaintiff individually,
and as representative of a class
consisting as of 1987, water and
sewer customers of the Defendant
in Gem Beach Subdivision Plats I,
II, III, & IV,
v.
Gem Boat Services, Inc. n/k/a
Gem Beach Marina, Defendant

Trial Court No. 24146
Ottawa County Common Pleas Court
Judge Paul Moon

AMENDED RULE 23 NOTICE TO POTENTIAL CLASS MEMBERS

TO ALL POTENTIAL MEMBERS OF THE PLAINTIFF CLASS:

This Notice is to inform you that a Complaint was filed on or about September 11, 1987 against Gem Boat Service, Inc., now known as Gem Beach Marina, Inc. ("Gem Beach"). Subsequently, this Court certified a plaintiff class consisting of all water and sewer customers of Gem Beach in the Gem Beach Subdivision Plats I, II, III, and IV as of 1987. It has been determined that you may satisfy these criteria.

Originally, the Complaint sought to recover three times the entirety of the water and sewer charges paid by each customer from 1962 through 1987 on the grounds that Gem Beach had not filed rate schedules with the P.U.C.O. during that period. Since then, the Ottawa County Court of Appeals has held that each member of the Plaintiff Class must prove that he or she suffered actual damages in order to recover; that

is, that Gem Beach charged him or her excessive or unreasonable water and sewer charges during that time period.

The representative of the Plaintiff Class, Ken Meek, has filed an Amended Complaint alleging that the members of the class have suffered actual damages. Gem Beach denies that its water and sewer rates were excessive or unreasonable, and has raised a number of affirmative defenses. This Notice is not to be understood as an expression of any opinion by this Court as to the merits of any claims or defenses asserted by either side in this litigation, but is sent for the sole purpose of informing you of the pendency of this litigation so that you may make appropriate decisions as to what steps you may wish to take in relation to this lawsuit. Establishment by the Court of the class does not mean that any money will be obtained for the class members, for that is a contested issue which has not been decided. Rather, the class certification means that the ultimate outcome of this lawsuit -- whether favorable to the plaintiffs or to the defendant -- will be binding upon all class members who elect to participate in this lawsuit.

You are advised that you have the option of either participating in this class action or electing not to participate. If you participate in this class action, in order to be entitled to recover damages, you will be required at trial to present evidence establishing that the fees you paid for water and sewer services during that portion of the period between 1962 and 1987 in which you were a water and sewer customer of Gem Beach were unreasonable or excessive. You are also advised that, if you remain in the Class, Ken Meek and his attorney, David R. Pheils, Jr., Esq., will act as your representative and your counsel, respectively, in this action, but that you also have a right if you wish to appear individually through separate counsel to represent your own interests more directly. If you participate in the Class, the judgment in this action, whether

favorable or unfavorable to the plaintiffs, will be binding upon you.

Attached to this Notice is a form which you must fill out and return if you do not wish to participate in this lawsuit. If you do not return the election form, you will become a member of the Plaintiff Class. If you elect not to participate in this lawsuit, please mail the form to Clerk of Courts, Court of Common Pleas, Ottawa County Court House, Port Clinton, Ohio, 43452 by mail postmarked by no later than Friday, July 12, 1991.

/S/
JUDGE PAUL MOON
OTTAWA COUNTY COURT OF
COMMON PLEAS

66/20559APA.550

ELECTION FORM

The undersigned does not wish to be a member of the Plaintiff Class certified in the case, Ken Meek v. Gem Boat Service, Inc. nka Gem Beach Marina, Inc., Case No. 24146, Court of Common Pleas for Ottawa County, Ohio.

_____

Signature

_____

Print Name

_____

Address

This form is to be returned by mail postmarked by no later than Friday, July 12, 1991, to:

Clerk of Court
Court of Common Pleas
Ottawa County, Ohio 43452

66/20559APA.550

Supreme Court, U.S.
FILED
OCT 12 1993

No. 93-408

In The

Supreme Court of the United States

October Term, 1993

KEN MEEK,

Petitioner,

vs.

GEM BOAT SERVICE, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A writ of certiorari should be denied, because the only viable question presented by this case – whether, to protect the integrity of class action proceedings arising under state law, an Ohio trial court abuses its discretion by imposing sanctions on class counsel who, among other misconduct, on two separate occasions, invaded the province and responsibility of the court to "direct to the members of the class the best notice practicable" – is entirely a question of Ohio law.

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In addition to those Opinions listed in the Petition, the following is relevant to this proceeding:

Meek v. Gem Boat Service, Inc. (Jan. 24, 1992), C.P. Ottawa Cty. Ohio No. 24146, unreported.

STATUTES AND REGULATIONS

This action involves Rule 23 of the Ohio Rules of Civil Procedure, the text of which is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

The instant Petition for Writ of Certiorari ("Petition") is the final step in the second appeal in this case raising issues regarding the errant conduct of petitioner Ken Meek's counsel, David A. Pheils, Jr., in connection with the class certification notice requirement of Rule 23(C)(2) of the Ohio Rules of Civil Procedure ("Civ.R.").[1]

In May of 1989, Pheils prepared and distributed to potential class members a "Rule 23 Notice" ("1989 Notice") purportedly "directed by the Court." Despite the fact that the 1989 Notice gave the appearance that it had been sent by the court, the trial court had not

[1] Except for its division (F), which is not involved in this case, Civ.R. 23 is identical to Rule 23 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").

directed the 1989 Notice and had not approved its contents. The 1989 Notice was also untimely; it was sent after Visiting Judge Gilson had already granted Plaintiff's Cross Motion for Partial Summary Judgment on the issue of liability (a ruling which was later reversed on appeal). Further, the 1989 Notice told recipients that they had already won and the accompanying May 31, 1989 cover letter told them that they would automatically receive damage awards – less a 40 percent fee Pheils had awarded himself. As a result of this seriously flawed Notice, Gem Boat Service, Inc. nka Gem Beach Marina, Inc.[2] ("Gem Beach"), respondent herein, filed a motion to vacate class certification, which the trial court denied.

A hearing on damages ensued and, on August 23, 1989, the trial court entered final judgment in the sum of $360,378.75 (treble the verdict returned by the jury, pursuant to Ohio statute). Gem Beach appealed to the Court of Appeals for Ottawa County, Ohio. In response to Gem Beach's third assignment of error (claiming that Judge Gilson had erred in denying defendant's motion to vacate the class certification), the Court of Appeals found nothing in the record indicating that Pheils had sent the 1989 Notice to potential class members pursuant to court order. The Court of Appeals concluded that Pheils had prepared and sent the 1989 Notice without court approval; as a result, it held that Civ.R. 23(C)(2) had not been complied with and, therefore, this action should not have proceeded as a class action. *Meek v. Gem Boat Service, Inc.* (Sept. 14, 1990), Ohio App. Ottawa Cty. No. 89-OT-32,

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[2] Gem Boat Service, Inc. nka Gem Beach Marina, Inc. has no parent company and no subsidiaries.

unreported ("*Meek I*"). Thus, there was no need for the Court of Appeals to rule on Gem Beach's concerns relating to the timing and content of the 1989 Notice.

Finding both Gem Beach's first assignment of error (directed to Judge Gilson's liability ruling) and third assignment of error well-taken, the Court of Appeals reversed the trial court's judgment and remanded this case to the trial court for further proceedings not inconsistent with its decision. The Supreme Court of Ohio denied Meek's motion to certify the record of the case to it. *Meek v. Gem Boat Service* (Feb. 13, 1991), Ohio Supreme Ct. No. 90-2193.

On remand, the trial court (now Judge Moon) ordered Pheils and the attorneys for Gem Beach to prepare and file with the trial court a new proposed notice to be sent to prospective class members to advise them, in an objective manner, of the status of the litigation and of their right to opt out of the class. The attorneys were unable to agree on a proposed notice. Gem Beach then filed Defendant's Report to the Court Re: Notice to Potential Class Members, to which was attached its proposed Amended Rule 23 Notice to Potential Class Members. Similarly, Meek submitted Plaintiff's Motion for the Court to Adopt Plaintiff's Proposed Second Notice, to which was attached his proposed Second Rule 23 Notice to Class Members.

On May 29, 1991, the trial court selected and executed the class certification notice proposed by Gem Beach ("1991 Notice"), thereby rejecting the form and content of the notice proposed by plaintiff.

Although the trial court issued no order empowering him to do so, Pheils proceeded to mail out the court's 1991 Notice to the potential class members.[3] Unbeknownst to Gem Beach, and without the trial court's knowledge or authorization, Pheils sent the court's 1991 Notice as an "enclosure" to his own personal cover letter and questionnaire. *See* Petition at 18-24.

While the 1991 Notice approved by the trial court neutrally and objectively set forth the information required by Civ.R. 23(C)(2), and was not suggestive of the probable outcome of this action (*see* Petition at 25-28), Pheils's cover letter and questionnaire defied those standards. The cover letter and questionnaire were obviously designed to discourage potential class members from opting out, contained false and misleading information in several respects, and undermined portions of the court-approved 1991 Notice. In short, as shown below, by sending his unauthorized, misleading and biased materials in the same envelope with the court-approved Notice, Pheils sabotaged the trial court's attempt to notify potential class members of the nature of the case and their options in an accurate, neutral and objective manner, as required by Civ.R. 23.

Specifically, in his cover letter, Pheils misrepresented the nature and extent of damages the members of the class are eligible to recover. The court's 1991 Notice accurately told potential class members that, under the Court of Appeals' decision in *Meek I*, they might recover to the

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[3] Contrary to his assertion at page 1 of the Petition, Pheils did the mailing, *not* "plaintiffs."

extent they demonstrate Gem Beach charged excessive or unreasonable water and sewer fees, subject to Gem Beach's defenses. Pheils erroneously claimed in his letter, however, that the Court of Appeals had ruled that class members could also recover for other types of alleged damages, such as alleged instances of inadequate water and sewer service and "mental distress" and "humiliation" from such service. The Court of Appeals did not so rule, as was subsequently confirmed by Judge Moon.[4]

The trial court's 1991 Notice properly expressed no opinion as to the merits of plaintiff's claim. Pheils, in sharp contrast, opined twice that, on remand, the jury would probably return a much larger verdict for the class than had occurred in earlier proceedings.

The trial court's 1991 Notice neutrally explained that potential class members may participate in this action or elect not to participate. Pheils threatened that those who opt out may be barred by "statute of limitations problems raised by Defendant" from pursuing their claims separately. This was misleading in two respects. First, the statute of limitations defense which defendant has raised would apply equally to persons who elect to participate in this action and to those who choose to opt out. Second, since "the filing of a class action suspends the applicable

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[4] By Journal Entry filed October 3, 1991, the trial court granted Gem Beach's Motion for Partial Summary Judgment on the issue of damages. The trial court determined therein that, under the relevant statutes, "[p]laintiffs have no right to prove damages generally. . . . Plaintiffs have no right to prove adequacy or inadequacy of services, or quality or lack of quality of services." Thus, plaintiffs are not entitled to the types of damages described in Pheils's cover letter and questionnaire.

statute of limitations for all class members," *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984) (citations omitted), and this case was filed less than five months after the finish of the underlying administrative proceeding, persons who chose to opt out would have had some seven months to pursue their claims separately.

More importantly, though, Pheils's (mis)statement to potential class members that their *separate* claims would be time-barred violated the trial court's May 29, 1991 order approving the form and content of the notice submitted by defendant. Pheils raised this issue in his Motion for the Court to Adopt Plaintiff's Proposed Second Notice. By approving defendant's (and not plaintiff's) form of notice, the trial court implicitly rejected Pheils's contention that potential class members needed to know about defendant's statute of limitations defense to make an intelligent choice between participating and opting-out.

Finally, Pheils represented that he was sending the 1991 Notice on the court's behalf, "[p]ursuant to Order of the Court." In fact, as both the trial court and the Court of Appeals found, no such court order existed.[5]

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[5] In addition, Pheils neglected to advise the absent class members that, for their protection, attorney fees in successful class actions for money damages are determined by the court, not by arrangement between class counsel and certain of the absent class members. *See* Petition at 19; H. Newberg, 3 *Newberg on Class Actions* § 15.16 at 15-48 (3rd ed. 1992) ("the court awards class action fees pursuant to its inherent equity powers").

Gem Beach then filed a motion for sanctions against Pheils because of his misconduct.[6] A hearing on the motion was held on September 12, 1991.

In its Judgment Entry, the trial court found that:

1. As was the case in *Meek I*, Pheils had sent out the 1991 Notice without any court order empowering him to do so (App. 5-6); and

2. Pheils's cover letter and questionnaire contained "misleading contents" and "self serving misrepresentations," and "[t]he contents of the cover letter and questionnaire are a gross and egregious perversion of the requirements of objective notice set out in Civil Rule 23(C)(2) and of the objective notice selected by the Court." App. 6.

The trial court observed that Pheils's actions placed the case "in the very same posture that it was in when the case came back from the Court of Appeals over two years ago," (App. 6) and that the damage done by Pheils could well be irreparable:

> If this case is ever to proceed to resolution, are we to send yet a third mailing to the potential class members? If we do eventually *order* a notice out, how do we explain in any meaningful way to the beleaguered class the prior two false starts? More troubling is how any revised notice can adequately and objectively inform the potential class of the status of the case and

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[6] Contrary to the assertion at page 1 of the Petition, Gem Beach's motion for sanctions sought no sanctions against the named plaintiff or potential class members, and none were awarded, as the Court of Appeals affirmed. *See* Petition at 16.

> cleanse from their collective psyche the utter rubbish contained in the cover letter and questionnaire.

App. 7 (emphasis in original).

The trial court then issued the sanction order set forth at page 2 of the Petition. Further, the trial court retained jurisdiction of this cause and gave plaintiff thirty days to secure new counsel and cause him or her to enter an appearance in this case.

Meek appealed to the Court of Appeals for Ottawa County, Ohio. In a unanimous Opinion and Judgment Entry filed February 12, 1993, the Court of Appeals affirmed the trial court's sanction order. The appellate court found that the trial court had sanctioned Pheils for two distinct reasons:

1. He "improperly sent notice of the class action to potential class members without a court order," Petition at 17;

2. He "included statements in communications sent to potential class members which indicated an inability of the counsel to adequately represent the class." *Id.*

As to each of these distinct grounds, the Court of Appeals held that, in sanctioning Pheils, the trial court had not abused its discretion. Petition at 15, 16.

With respect to the first reason for Pheils's removal, the Court of Appeals cited its previous ruling "that Civ.R. 23(C)(2) contains 'mandatory language . . . [which] indicates that the court must order that a notice be sent. However, we find nothing improper with the court ordering a party to send the notice.' " Petition at 15. Noting

that Pheils, who participated in *Meek I*, was aware of that ruling and that "nothing in the record reflects any action taken by the court to either send the [1991] notice directly, or to order appellants' counsel to send the notice," *id.*, the court below concluded:

> Therefore, *appellants' counsel's action* of sending the notice, accompanied by a cover letter from counsel and a questionnaire drafted by counsel of the prospective class members, without prior court approval, *resulted in the second commission of an error which had already required the reversal of this case for remedial action.*

Id. (Emphasis added.) The court below held that "[t]he trial court did not act in an unreasonable, arbitrary or unconscionable manner, therefore, when it ruled that attorney Pheils's actions required his removal from the case and from further participation in the case, so that the court could protect the integrity of the proceedings." *Id.*

With respect to the second reason for Pheils's removal, the court below concluded that, based on the harmful effects of the misleading contents and self-serving misrepresentations of the cover letter and questionnaire Pheils mailed to potential class members with the 1991 Notice, the trial court "could reasonably conclude . . . that attorney Pheils was no longer competent to protect the interest of the class or to continue representation of the class," Petition at 16, and that it acted responsibly, protecting the rights and interests of the class, when it disqualified Pheils. *Id.*

Finally, the Court of Appeals held that Pheils's contention that the trial court's sanctions infringed upon his First Amendment rights was without merit. The trial

court's actions "did not constitute any prior restraint, as the communications had already occurred." Petition at 16. Moreover, the court below disagreed with Pheils's contention that the trial court had imposed sanctions on him as a punishment for communicating with clients. The Court of Appeals found that the trial court had sanctioned Pheils because he "had demonstrated an unwillingness to conduct the case in a manner required by law, and an inability to adequately represent the class members." *Id.*

The Supreme Court of Ohio denied Meek's motion to certify the record of the case to it "for the reason that no substantial constitutional question exists therein." *Meek v. Gem Boat Service* (June 23, 1993), Ohio Supreme Court No. 93-719.

ARGUMENT

A WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE ONLY VIABLE QUESTION PRESENTED BY THIS CASE – WHETHER, TO PROTECT THE INTEGRITY OF CLASS ACTION PROCEEDINGS ARISING UNDER STATE LAW, AN OHIO TRIAL COURT ABUSES ITS DISCRETION BY IMPOSING SANCTIONS ON CLASS COUNSEL WHO, AMONG OTHER MISCONDUCT, ON TWO SEPARATE OCCASIONS, INVADED THE PROVINCE AND RESPONSIBILITY OF THE COURT TO "DIRECT TO THE MEMBERS OF THE CLASS THE BEST NOTICE PRACTICABLE" – IS ENTIRELY A QUESTION OF OHIO LAW.

The facts of this case demonstrate that Pheils was sanctioned for two distinct reasons. First, the trial court

found that, on two separate occasions, Pheils sent notice of the class action to potential class members without the court's having ordered or authorized him to do so, contrary to the mandate of Civ.R. 23(C)(2) and the law of the case in *Meek I*.[7] Although petitioner attacked this finding of the trial court in the Court of Appeals, that court confirmed that "nothing in the record reflects any action taken by the trial court . . . to order . . . [Pheils] to send the notice." Petition at 15. Whether or not the Court of Appeals was correct in affirming that finding, and whether or not that finding justified the sanction of removal of Pheils as class counsel, are purely matters of Ohio law, and pose no federal question. Thus, this Court could not grant Pheils the relief he seeks – reinstatement as class counsel – even if it accepted all of his trumped-up constitutional arguments. For this reason alone, a writ of certiorari should not be granted.

We turn now to the questions petitioner presents for review.

This is a Civ.R. 23(B)(3) class action, in which questions of law or fact common to the members of the class were found to predominate over questions affecting only individual members. In such class actions, Civ.R. 23(C)(2), like its federal counterpart, Fed. R. Civ. P. 23(c)(2), requires the trial court to direct the best notice practicable to advise prospective class members of their options.[8]

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[7] Petitioner has failed to disclose the existence of this independent sanction ground in his Statement of the Case. *See* Petition at 1-3.

[8] As the opinions of the courts below demonstrate, Ohio courts follow that body of federal law requiring the class

Proper class action procedures are critical to the maintenance of a class action. "It is clear . . . that the notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833-834 (3d Cir. 1973).

> [C]lass action procedures . . . can be tolerated . . . only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice. . . . The ultimate responsibility [for compliance with the procedural rules] . . . is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power.

Id. at 831-832.

Pheils's conduct here cannot be squared with the preeminent role Civ.R. 23(C)(2) assigns to the court in the class certification notice process. Consequently, the questions petitioner presents for review are designed to seek this Court's assistance in limiting trial courts' supervisory powers, particularly the power to take remedial action against class counsel who fails and refuses to play by the rules.

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certification notice to describe the proceedings accurately, in a neutral, objective tone not suggestive of the probable outcome of the case.

A. This Case Presents No First Amendment Free Speech Issue.

Attempting to invent a federal question, petitioner implies, at pages 5-6 of his Petition, that Ohio appellate courts have construed Civ.R. 23 as allowing Ohio trial courts to impose broad restrictions on communications from named plaintiffs and their counsel to prospective class members for mere prophylactic reasons, as the district court had done in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 68 L. Ed.2d 693, 101 S.Ct. 2193 (1981).[9] That implication is untrue. *See* Petition at 16, wherein the court below stated:

> Finally, this court finds that appellants [sic] assertion that the trial court's actions were an infringement of First Amendment rights is without merit. The actions of the court did not constitute any prior restraint, as the communications had already occurred. In addition, the trial court did not impose the sanctions as a punishment for communicating with clients, rather it imposed the sanctions on attorney Pheils because attorney Pheils had demonstrated an unwillingness to conduct the case in a manner required by law, and an inability to adequately represent the class members.

What the courts below *did* do in this case was to construe Civ.R. 23 as authorizing Ohio trial courts to

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[9] *Gulf Oil, supra*, and *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (9th Cir. 1980), also cited by petitioner, are one and the same case. In the only other case cited by petitioner, *Domingo v. New England Fish Co.*, 727 F.2d 1492 (9th Cir. 1984), the Ninth Circuit simply applied this Court's *Gulf Oil* ruling in a case presenting a fact pattern like that in *Gulf Oil*. *Domingo* adds nothing to *Gulf Oil*.

supervise counsel's conduct in the class notice process and, if needed to protect the integrity of class action proceedings, to impose sanctions on wayward counsel. That construction of Civ.R. 23 is perfectly consistent with this Court's statement that "[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100.

Contrary to petitioner's implication, no ruling in this case is at odds with this Court's ruling that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil*, 452 U.S. at 101. Moreover, since no prior restraint order was ever issued in this case, it is not an appropriate vehicle for determining what standards are mandated by the First Amendment with respect to prospective limitations on communications from named plaintiffs and their counsel to class members. See *Gulf Oil*, 452 U.S. at 101, n. 15.

Petitioner's first question should not be accepted for review.

B. This Case Presents No Due Process Question.

The alleged federal question sought to be raised by petitioner's second question is whether the trial court's actions (inaccurately characterized by petitioner as the denial of information and advice from class counsel to

class members) deprived class members of "due process protected by the Fourteenth Amendment § 1 of the United States Constitution." Petition at 8. This due process question was neither raised in, nor passed upon by, any of the courts below. As a result, this Court lacks jurisdiction to consider the question. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), rehearing denied, 463 U.S. 1237, 77 L.Ed.2d 1453, 104 S.Ct. 33 (1983).

In addition, petitioner's second question lacks constitutional dimension. It merely attempts to attack the trial court's finding that the cover letter and questionnaire Pheils mailed with the 1991 Notice to prospective class members was misleading, as well as the Court of Appeals' holding that such a finding justified the trial court's conclusion that Pheils was no longer competent to represent the class. Whether or not the Court of Appeals was correct in so holding is a matter of state law relating to the supervisory powers of trial courts under the Ohio Rules of Civil Procedure. Simply reciting the mantra of the due process clause of the United States Constitution, as petitioner does at page 8 of the Petition, does not transform that question into one of federal law.

This Court cannot accept petitioner's second question for review.

C. This Case Does Not Involve Rules Governing Prior Restraints.

In yet another attempt to conjure up a federal question where none exists, petitioner contends that *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), somehow supports his position

that the First Amendment shields Pheils from sanctions for his misconduct here. *See* Petition at 9.

Apparently, the point of petitioner's third question is that, unless a message is judicially determined to be unprotected by the First Amendment before it is aired, the speaker cannot be punished for having promulgated it. Certainly, lawyers facing contempt charges for their courtroom outbursts would appreciate such a rule, but *Carlin* holds nothing of the kind. Rather, the court in *Carlin* applied the familiar rule that, absent prior judicial determination that a particular message is obscene, *prior restraint* of the message is unconstitutional. *See* 827 F.2d at 1296. *Carlin* is just another prior restraint case.

Pheils was never subjected to any threat of criminal prosecution or any other form of prior restraint. Therefore, the rules distinguishing lawful from unlawful prior restraints do not have any application in this case.

Petitioner's third question is not worthy of this Court's attention.

CONCLUSION

Meek's Petition should be denied for want of any substantial federal question.

Respectfully submitted,

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APPENDIX

RULE 23. CLASS ACTIONS

(A) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

> (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all

members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in Conduct of Actions. In the conduct of actions to which this rules [sic] applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to

come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(E) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(F) Aggregation of Claims. The claims of the class shall be aggregated in determining the jurisdiction of the court.

IN THE COURT OF COMMON PLEAS OF
OTTAWA COUNTY, OHIO

KEN MEEK, et al.,

Plaintiffs,

-vs-

GEM BOAT SERVICE, INC., etc.,

Defendants.

Case No. 24146

JUDGMENT ENTRY

(Filed Jan. 24, 1992)

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This matter is before the Court on defendant's motion for sanctions. The Court has before it memoranda filed by all parties and the arguments of counsel presented at oral hearing. This case, filed September 11, 1987 as a class action, has already been to the Court of Appeals once. For historical purposes there is no need to review or restate those matters covered by the Court of Appeals in its decision and journal entry dated September 14, 1990 (C.A.#89-OT-32), except to note that chief among the Court of Appeals' findings is (1) that no proper class had been created and (2) that no proper notice had been sent to prospective class members pursuant to Civil Rule 23(C)(2). The notice actually sent by Attorney for Plaintiffs was improperly prepared and was in fact "sent . . . without Court approval." Opinion, *supra* at page 8. The issue of sactions [sic] arises because defendant asserts that Attorney for Plaintiffs has yet again sent out an improper notice to the prospective class members. After remand from the Court of Appeals, this Court held a pretrial conference May 3, 1991 as a result of which a Pretrial Order was entered May 6, 1991 granting counsel for plaintiffs and defendant fifteen (15) days to prepare

and file their proposed notice to the class. Counsel for plaintiffs prepared his proposed notice, Exhibit A attached hereto. Defendant presented its proposed notice, Exhibit B attached hereto and subsequently the Court selected the Exhibit B notice and executed the same *but did not then order that it be sent or distributed by any party or person.* Nevertheless, attorney for plaintiff took it upon himself to send out the notice under cover of his personal stationery dated June 20, 1991 (Exhibit C attached hereto) and attaching thereto a four page questionnaire, so called, Exhibit D. The contents of the cover letter and questionnaire are a gross and egregious perversion of the requirements of objective notice set out in Civil Rule 23(C)(2) and of the objective notice selected by the Court. The actions of plaintiffs' counsel now places [sic] this case in the very same posture that it was in when the case came back from the Court of Appeals over two years ago. The requirement that the Court order the notice be sent by a party or by itself is a critical step in creating the class. A paragraph from the September 14, 1990 Court of Appeals Opinion aptly describes the case then, as now.

> There is nothing in the record, however, to indicate that a notice was sent to class members pursuant to Civ. R. 23(C)(2). The mandatory language of the rule indicates that the court must order that a notice be sent. However, we find nothing improper with the court ordering a party to send the notice. Accord, *Minnesota v. United States Steel Corp.* (D. Minn., 1968), 44 F.R.D. 559. Nonetheless, the record in this case does not contain an order from the court directing Meek to send such a notice.

> Therefore, we conclude that any notice prepared and sent was without court approval."

This turn of events is most disturbing and frustrating. If this case is ever to proceed to resolution, are we to send yet a third mailing to the potential class members? If we do eventually *order* a notice out, how do we explain in any meaningful way to the beleaguered class the prior two false starts? More troubling is how any revised notice can adequately and objectively inform the potential class of the status of the case and cleanse from their collective psyche the utter rubbish contained in the cover letter and questionnaire, Exhibits C and D. All the defenses and apologies raised by plaintiffs in their response to the motion for sanctions, including the First Amendment arguments, have no application because plaintiffs' attorney sent everything out before the Court ever ordered it! This is not a prior restraint on free speech, not a punishment for the exercise of free speech, nor an infringement upon the attorney/client relationship. Cf *Bernard v. Gulf Oil*, 619 Fed. 2nd 459, 1980. Even if the Court executed notice, without the order to deliver, could have been presumed by counsel to constitute some implied authority to notice, we still have the difficult problem of setting right the frame of mind of the potential class members and dispelling the self serving misrepresentations contained in the cover letter and questionnaire. Plaintiffs' counsel cannot assume that he is the one to notice the class because Civil Rule 23(C)(2) requires the Court to "direct to the members of the class the best notice practicable under the circumstances . . . " The Court may, as the Court of Appeals pointed out, empower *by order* a party to send notice, but plaintiffs' attorney acted before that

was ever done. The misleading contents of the cover letter of June 20, 1992 and of the questionnaire far exceed in attitude, bias and content the notice selected by the Court and the contents of notice prescribed by Civil Rule 23(C)(2).

As a sanction the Court, under its general equity powers, its inherent power to control the conduct of counsel, and as specifically authorized in Civil Rule 23, ORDERS that plaintiffs' attorney David R. Pheils, Jr. be removed from further representation herein, that he have no further participation in this case, that he pay the costs of these proceedings to date from remand from the Court of Appeals, including all costs related to the abortive second notice, and that he pay in addition as a sanction the sum of Five Hundred Dollars ($500.00) to defendants' attorneys as compensation for their time and expense incurred on the matter of notice and sanctions. See 1 Moore's Federal Practice, Manual for Complex Litigation, Article 30.24, 1986, and *Royal Indemnity Co. v. J.C. Penney Co.*, 27 O S 3rd 31, 1986, and cases cited therein.

Said attorney shall also pay the costs attributed to all curative measures deemed appropriate by the Court after new counsel enters the case.

Plaintiffs are hereby given 30 days leave to secure new counsel and have them enter an appropriate appearance in this case, whereupon the matter will be set for Pretrial and such other proceedings as are appropriate.

And this cause is continued.

/s/ Paul C. Moon
JUDGE